ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 9 of the Communica-	)	
tions Act	)	MD Docket No. 96-186
	)	
Assessment and Collection of Regulatory Fees	)	
for Fiscal Year 1997	)	

To: The Commission

BELLSOUTH COMMENTS

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COMMENTS OF BELLSOUTH

BellSouth Corporation ("BellSouth") hereby submits these comments in response to the Commission's *Further Notice of Proposed Rulemaking* in MD Docket No. 96-186, FCC 97-254 (rel. July 18, 1997), 62 Fed. Reg. 40036 (July 25, 1997) ("*FNPRM*"), regarding the assessment and collection of regulatory fees for Fiscal Year 1997. While BellSouth does not object to the Commission's proposal to codify general record keeping requirements for Commercial Mobile Radio Services ("CMRS") carriers in connection with the payment of regulatory fees, it strongly opposes any proposal to publish proprietary information regarding a licensee's subscriber units and total annual regulatory fees paid.

INTRODUCTION

In the Omnibus Budget Reconciliation Act of 1993,[1] Congress authorized the Commission to assess and collect annual regulatory fees to recover costs incurred in carrying out the Commission's enforcement activities, policy and rulemaking activities, user information services, and

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[1] Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 397.

international activities.[2] Since 1994, the Commission has collected regulatory fees from Commission licensees, including CMRS providers. The Commission adopted rules regarding the collection of regulatory fees that ensure that: 1) the collection of fees does not adversely affect the Commission's regulatory activities; 2) the most effective means possible are employed in the collection and deposit of fees; and 3) the paperwork on the public resulting from the collection process is kept to an absolute minimum.[3] In establishing these rules, the Commission sought to minimize the burden on the entities subject to making regulatory fee payments.

Over the years, the Commission has adjusted the fees owed by Commission licensees to reflect the costs established by Congress for the Commission's enforcement, policy and rulemaking and international activities. For FY 1997, the Commission once again revised its fee schedule in order to meet the costs established by Congress for the Commission's enforcement, policy and rulemaking and international activities. The Commission utilized a new cost accounting system to determine its costs for regulation of those services subject to a fee for FY 1997. This new system was designed to generate useful data for identifying the actual costs of the FCC's regulation by category of service. Based on this new system, the Commission determined that the regulatory fees for CMRS Mobile service providers is based on a per unit fee of $0.24.[4]

Once the rules for FY 1997 were established, however, the Commission issued its *FNPRM* proposing to require only CMRS carriers to maintain for three years documentation supporting the

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[2] *See Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year,* MD Docket 94-19, *Notice of Proposed Rulemaking*, 9 F.C.C.R. 6957, 6958 (1994).

[3] *Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year,* MD Docket 94-19, *Report and Order*, 9 F.C.C.R. 5333, 5335 (1994).

[4] In FY 1997, the Commission distinguished between broadband and narrowband CMRS providers and established a CMRS Messaging Service to include all narrowband services, including two-way paging services. Licensees in this new category are required to pay $0.03 per unit.

accuracy of regulatory fee payments, and to make this information available to the Commission upon request within thirty days.[5] The Commission has also proposed to publish the total regulatory fees paid by "commercial communication firms and businesses," along with the number of subscriber units used in determining the fee payments, so that "fee payers will be able to verify that their fee payments have been properly recorded and to bring errors to [the Commission's] attention."[6] These additional requirements were proposed only for commercial communication entities, and not for the many other carriers required to pay regulatory fees.

BellSouth does not object to the Commission's proposals to require that CMRS licensees maintain documentation concerning the basis for their fee payments for three years and to publish the names of entities that pay regulatory fees each year. Requiring CMRS licensees to maintain documentation to support their payment amounts is merely a codification of good business practices already in place by most carriers, and therefore is not unnecessarily burdensome. As discussed below, however, BellSouth strongly opposes publication of information related to the number of units (subscribers) used by licensees to determine their annual regulatory fees and the total fees paid. Such information is confidential and proprietary in nature and its publication is not necessary to serve the Commission's stated purpose of allowing fee payers to ensure their fees have been properly recorded. To the extent the Commission is concerned with giving fee payers the ability to verify recordation, it could mail a receipt to the licensee instead of publishing the information in a lengthy Federal Register publication. Disclosure of the basis for a licensee's payment and the amount of that payment will not facilitate verification or provide any other public benefit. Indeed it would ultimately create more regulatory burdens on the Commission and on the public.

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5 *FNPRM* at ¶¶ 2-3.

6 *FNPRM* at ¶ 6.

I. PUBLICATION OF REGULATORY FEE INFORMATION WILL COMPETITIVELY HARM COMMERCIAL LICENSEES AND DOES NOT SERVE ANY STATED PUBLIC BENEFIT

BellSouth opposes the Commission's apparently arbitrary decision to single out only "commercial communication firms and business" by publishing annually in the Federal Register the names of such commercial entities that have paid a regulatory fee for the proceeding fiscal year, including the amount of the fee paid and the volume or units upon which the fee payments were based.[7] While BellSouth does not object to the simple publication of the names of those entities that submitted regulatory fee payments for the proceeding year (although there is no pressing need to do so), BellSouth believes the Commission's proposal to disclose a licensee's proprietary information, including the number of units and the amount it paid in regulatory fees, lacks any justification and would be contrary to the public interest. Such information does not benefit the public in any manner and will only further burden the Commission with excessive waivers and petitions for the "confidential treatment," or disclosure, of such proprietary information.

Moreover, the Commission should not commence with a new proposal regarding the release of confidential information until it terminates its current proceeding in GC Docket No. 96-55. In *Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, the Commission sought to develop a policy to guide it in evaluating requests for confidential treatment provided by Commission licensees.[8] In assessing its objectives in that proceeding, the Commission found that the central issue confronting it was "how to avoid

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[7] *FNPRM* at ¶ 6. BellSouth notes that the *FNPRM* is unclear about whether this proposal to publish such information regarding "commercial communication firms and businesses" is intended to apply only to CMRS carriers or to some unspecified broader classification of commercial carriers. In any event, any such selective imposition of regulatory burdens lacks justification and therefore would be arbitrary and capricious.

[8] *In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, *Notice of Inquiry and Notice of Proposed Rulemaking*, 11 F.C.C.R. 12406 (1996) ("*Confidential Treatment NPRM*").

unnecessary competitive harm that could be caused by the disclosures of such information and still fulfill [its] regulatory duties in a manner that is efficient and fair to the parties and members of the public who have an interest in [FCC] proceedings."[9]

This same issue confronts the Commission in the instant proceeding. The difference, however, is that the circumstances surrounding the Commission in the instant context are not licensing, tariff, or rulemaking proceedings where the withholding of confidential submissions decreases the amount of information available to the public for participation in Commission proceedings. In the instant context, commercial licensees have been singled out amongst a field of Commission licensees to disclose proprietary information regarding the number of units they have in service and the fees paid for these units, which information can be used against them by both other competing commercial entities and non-commercial entities alike. While the Commission's FNPRM, provides that licenses should request confidentiality when submitting proprietary information,[10] this is insufficient to guarantee licensees that their information will be treated confidentially, particularly if the Commission does not deem the relevant information as proprietary in nature.

The disclosure of this information has *not* been shown by the Commission to be necessary for it to fulfill its regulatory duties. In fact, the Commission does not elaborate on the need to disclose information regarding commercial licensee payment amounts and subscriber unit information other than to state that publication of this information would enable fee payers to verify that their payments have been properly recorded and to the bring errors to the Commission's attention, thus reducing the burden on the Commission's fee verification process.[11] Certainly this

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9 *Id.* at 12408.

10 *FNPRM* at ¶ 6.

11 *Id.* at ¶ 6.

goal can be achieved by means other than publishing sensitive business proprietary information, by providing licensees, for example, with a receipt for regulatory fees paid to allow the licensees to confirm proper recordation by the Commission. A receipt is far more likely to be used by the licenses' accounting staff to verify the accuracy of payment than figures buried in a lengthy table published annually in the Federal Register.

The Commission adds that "certain types of proprietary information may be entitled to confidential treatment" and "fee payers who believe they qualify should request confidentiality when filing the relevant information."[12] Prior to the instant proceeding, BellSouth has customarily requested that the Commission withhold from public inspection information provided with its annual regulatory fee payment that pertains to the number of subscribers per market. Should the Commission adopt its proposal, it will incur the burden of processing many similar confidentiality requests by other commercial licensees. The disclosure of this information would be deemed by many to cause substantial harm to the competitive position of the filing entity. Thus, instead of easing its regulatory burdens, the Commission would in fact be increasing its burdens by increasing the number of confidentiality requests it will likely need to address should it consider publication of this proprietary information.

As noted by the Commission in its *Confidential Treatment NPRM*, Exemption 4 of the Freedom of Information Act ("FOIA"), provides that the government need not disclose "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[13] Whether commercial or financial information can be deemed "confidential" under Exemption 4 of FOIA has been the subject of much litigation. In *National Parks and Conservation*

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12 *Id.*

13 5 U.S.C. § 552(b)(4); *see Confidential Treatment NPRM*, at 12408.

Association v. Morton,[14] the Court established a two-part test whereby commercial or financial matters are considered confidential if disclosure of the information will either 1) impair the Government's ability to obtain necessary information in the future; or 2) cause substantial harm to the competitive position of the person from whom the information was obtained. This two-part test was further defined in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, where the court limited the definition of "confidential" to situations where a party must submit information to a federal agency that is of a kind that would customarily not be released to the public by the person submitting the information.[15] The Commission has recognized that the court's position in *Critical Mass* stands for the proposition that "if commercial or financial information obtained from a person is submitted voluntarily and would not customarily be disclosed by the submitter, it is deemed confidential without requiring any examination of the competitive harm or governmental impairment portions of the *National Parks* test."[16]

Additionally, in order to disclose such proprietary information, the Commission is bound by Sections 0.457(d)(1) and (2)(i) of its rules governing disclosure of competitively sensitive information under the Trade Secrets Act. The Trade Secrets Act stands as an affirmative restraint on any agency's ability to release competitive information. The U. S. Court of Appeals for the District of Columbia Circuit has previously held that if information may be withheld under Exemption 4, an agency is barred from disclosing it by the Trade Secrets Act unless the disclosure is otherwise authorized by law.[17] Although Sections 0.457(d)(1) and (2)(i) of the Commission's rules provide the Commission with the legal authority to disclose competitive sensitive information

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14 498 F.2d 765 (D.C. Cir. 1974).

15 975 F.2d 871, 879 (D.C. Cir. 1992).

16 *Confidential Treatment* 11 F.C.C.R. at 12410.

17 *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1151-52 (D.C. Cir. 1987).

upon a "persuasive showing" of the reasons in favor of the information's release, Section 0.457(d)(2)(i) provides that "if it is shown in the request that the materials contain trade secrets or commercial, financial or technical data would customarily be guarded from competitors, the material will not be made routinely available for inspection."[18]

In the past, the Commission has not automatically released such confidential information. In essence, the Commission has adhered to a policy whereby it "will not authorize the disclosure for confidential financial information on the mere chance that it might be helpful," rather the Commission will insist "upon a showing that the information is a necessary link in a chain of evidence which will resolve a public interest issue."[19] More recently, the Commission has found that the "competitive threat posed by widespread disclosure under the FOIA may outweigh the public benefit in disclosure."[20]

In the instant case, the Commission has not stated why the disclosure of potentially competitively sensitive information is even necessary or what important public interest issue it will resolve. It has provided no statement of public benefits that will arise from publishing the regulatory fee payment amounts and numbers of subscriber units associated with calculating the fee payment because *there is no public interest issue or benefit* achieved by such publication. While the Commission claims that it would be for the benefit of the filing parties, it is these very parties that do not want their information disseminated to the public. If the Commission's goal is for licensee's to ensure that their payments have been properly received by the Commission, then the Commission should establish a receipt or a generic letter within a database that would then be sent off to each

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18 47 C.F.R. § 0.457(d)(2)(i).

19 *Classical Radio for Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n.4 (1978).

20 *Cincinnati Bell Telephone Co. Tariff*, 10 F.C.C.R. 10574, 10575 (Com. Car. Bur. 1995).

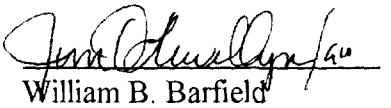
licensee submitting a regulatory fee payment. The receipt or letter would then confirm the amount paid by the licensee and the number of units covered by the licensee's submission.

CONCLUSION

The Commission must adhere to the same standards for releasing proprietary information by demonstrating that regulatory fee payment information concerning "commercial communication firms and businesses" is a "necessary link in a chain of evidence that will resolve a public interest issue."[21] Publishing such proprietary information in the Federal Register will only further burden the Commission's already limited resources with numerous requests for confidential treatment of such information. Accordingly, the Commission should not publish the regulatory fee payment and subscriber unit information provided by commercial operators in the Federal Register as publication of such information will competitively harm these licensees.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 

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[21] *Classical Radio for Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n.4 (1978).